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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1045

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

against *Appellants,*

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

PETER OTTLEY, as President, and PETER BYRNE, as Secretary-Treasurer, of LOCAL 144, HOTEL & ALLIED SERVICE EMPLOYEES UNION, affiliated with BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO,

against *Appellants,*

THE LONG ISLAND COLLEGE HOSPITAL,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT UNION'S JURISDICTIONAL STATEMENT

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Interest of *Amicus*

Section 716 of the Labor Law of New York represents the first attempt by New York State to utilize compulsory arbitration as a method of settling industrial disputes

where collective bargaining has failed. This statute has never before been interpreted by the New York Court of Appeals.

Throughout the proceedings below, appellee Long Island College Hospital argued that the compulsory arbitration provisions of § 716 deprived it of due process and equal protection under the Fourteenth Amendment of the Constitution. It was appellee's contention that the statute established insufficient guidelines for the authority delegated to the arbitrators, and that appellee must have judicial review of the certification of appellant Local 144, Hotel and Allied Service Employees Union.

In order to avoid "a serious question of due process" (Appellant's Appendix, p. A14, footnote 3), the New York Court of Appeals applied the statute so as to require judicial review of the certification.

Employees of non-profit hospitals may now neither strike nor bargain collectively. Their First Amendment rights may be suspended indefinitely in New York State while a procedure acknowledged by the decision below as of several years duration, is followed. When this procedure is completed, hearings relating to arbitration must first commence and this arbitration in turn is subject to limited judicial review. Thus, many years must elapse between election of a representative and the consummation of a collective bargaining contract.

As the chief legal officer of the State (N. Y. Executive Law § 63), charged with the defense of the enactments of our State Legislature (Executive Law § 71), the Attorney General is concerned with preserving the effectiveness and the constitutionality of state legislation. Since the application of this statute may make the legislation unworkable, employees will be hesitant to resort to it as a solution to an employer's intransigence. Thus, the decision below again places the State in the position of facing unlawful strikes rather than utilizing orderly procedures which maintain equality of bargaining power between the parties.

ARGUMENT

1. This appeal presents questions of great public importance because the application of the statute at issue by the New York Court of Appeals has undercut the State's attempt to resolve industrial disputes through compulsory arbitration.

This Court has approved compulsory arbitration as a means of avoiding strikes which may have disastrous consequences. In *Brotherhood of Railway Trainmen* v. *Chicago, and Indiana River Railroad,* 353 U. S. 30, 41 1957), it was held that strikes over disputes subject to compulsory arbitration under the Railway Labor Act may be enjoined, since:

> "Such controversies . . . are not the same as those in which the injunction strips labor of its primary weapon without substituting any reasonable alternative."

Section 716 of the Labor Law represents New York State's attempt to arrive at a "reasonable alternative" for nonprofit hospital workers who are prohibited from striking solely because their services are indispensable to the community. Prior to 1963, these employees were compelled to accept substandard wages and working conditions because employers had no legal duty to recognize or bargain with them.

Commenting on the hardship imposed on this group of workers by the issuance of injunctions, the Court in *Prospect Heights Hospital* v. *Davis,* 22 Misc. 2d 511, 515-516 (Sup. Ct. Kings Co., 1959), stated:

> "It is inconceivable that employees of charitable corporations, denied the benefits of the fair labor practice machinery set up in the State Labor Relations Act, barred, at least in this Department, from enjoy-

ing the safeguards against the injunctive mandates under § 876-a of the Civil Practice Act, unprotected by civil service laws, must be doubly relegated to an inferior status, that is forbidden their only economic weapon, the right to strike, and then forced to wander about in an industrial no man's land, helpless to organize, assemble, or publicize their grievances, as guaranteed to them by the federal and state constitutions."

After a series of strikes against non-profit hospitals in 1959 and 1962, it became apparent that new legislation was needed. In order to encourage voluntary settlement as well as to provide a means of finally resolving impasses, the New York State Legislature provided that all collective bargaining contracts which did not contain provisions for arbitration of disputes were deemed to provide for the appointment of a Fact-Finding Commission or invocation of arbitration, by order of the New York State Industrial Commissioner, after failure of the New York State Mediation Board to settle the dispute. Where no collective bargaining contract exists, the Mediation Board and the Industrial Commissioner could exercise the same powers as to mediation and arbitration.

This classic pattern of bargaining, mediation, fact-finding and—if all else fails—binding arbitration follows that of the Minnesota statute (Minn. Stat. Ann. §§ 179.35-179.30) prohibiting strikes by employees of charitable hospitals and concomitantly providing for compulsory arbitration of their labor disputes. Its constitutionality was upheld in *Fairview Hospital Assocation* v. *Public Building and Hospital Employees Union,* 241 Minn. 523, 64 N. W. 2d 16 (1954). The court found that the substitution of a reasonable alternative was a constitutional prerequisite to prohibiting strikes.

New York is one of several states which has chosen to rely upon compulsory arbitration in order to resolve in-

dustrial disputes involving employees in the private sector. See Pennsylvania, Purdon's Statutes Annotated, Title 43, Secs. 213.1-213.16; Florida Statutes, § 453.01 et seq.; Indiana, Burns' Stat. Ann., § 40.241 et seq.; Kansas, Gen. Statutes 44-603—44-609; Massachusetts, Ann. Laws of Mass., C 150 B; New Jersey, Revised Statutes, § 34:B-20, L. 1947, ch. 75.

Nor are employees of hospitals and public utilities the only kinds of workers whose right to strike has been abrogated and replaced by provisions mandating binding arbitration. Several categories of State employees in various jurisdictions are subject to such statutes. General Laws of Rhode Island §28-9.3 et seq., § 28-9.3-9, § 28-9.1; Pennsylvania, Purdon's Statutes Annotated, Title 43 §§ 217.1-217.10; Wyoming Statutes 1957 § 27-270; Louisiana Stat.. Ann. Revised Stat. § 23:890 (E) (1967 Supp.).

The decision below gave token recognition to the necessity for the formulation decided upon by the Legislature:

> ". . . [T]he Legislature well knew that, although the courts had enjoined hospital employees from striking and that it was in the public interest to continue the prohibition against such strikes, it would have been unjust to deprive hospital employees of their most potent weapon without granting them adequate means of securing relief against substandard wages and working conditions." (Appellants' Appendix, p. A9)

However, the Court went on to apply the New York statute so as to mandate a procedure acknowledged by the decision itself to be of several years duration, as a condition precedent to the commencement of arbitration. After the arbitration is complete, the courts must review it. Thus, many years would elapse between the election of a bargaining agent and the achievement of a collective bargaining contract.

The error inherent in the court's application and its conception of due process will be discussed at point 2 *infra*. The effect of this error is to create such protracted delays in the implementation of the legislative scheme that the statute becomes unworkable. Foreclosure of this lawful and orderly avenue of redress for hospital employees would place the State in the position of continuing to face illegal strikes.

The alternative approach to the prevention of strikes has been the imposition of fines and prison sentences. This method has been judicially accepted in New York, but has frequently been unsuccessful in its goal. See, e.g., *City of New York* v. *John J. DeLury*, 23 N. Y. 2d 175 (1968); *Board of Education* v. *Shanker*, 54 Misc. 2d 941 (Sup. Ct. N. Y. Co., 1967), aff'd 29 App. Div. 2d 634 (1st Dept. 1968).

The case at bar not only undercuts New York State's attempt to regulate labor regulations through binding recommendations by an independent third party, but also constitutes persuasive authority for courts of other states called upon to consider the validity of such statutes. It is a case of first impression in this judicial area, and its due process holding has broad implications with respect to the summary remedy of arbitration. State legislatures, as well, will be hesitant to institute this regulatory scheme if the New York Court of Appeals' holding is allowed to stand.

2. The decision below jeopardizes rights under the First Amendment of the United States Constitution.

This Court has recognized the right to organize and select representatives for lawful purposes of collective bargaining as "fundamental" and antedating the protections given by the National Labor Relations Act, 29 U.S.C. § 141 et seq.; *Auto Workers* v. *Wisconsin Board*, 336 U. S. 245, 259 (1948); *Labor Board* v. *Jones and Laughlin*, 301 U. S. 1, 33 (1936).

The right to strike has been characterized as "more vulnerable to regulation than the right to organize . . ." *Auto Workers* v. *Wisconsin Board, supra,* 336 U. S. at 259. However, this Court has consistently declared that federal policy favors protection of peaceful strikes for higher wages. As this Court said in *Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221, 233-234 (1962):

> "This repeated solicitude for the right to strike is predicated upon the conclusion that a strike when legitimately employed is an economic weapon which in great measure implements and supports the principles of the collective bargaining system.
>
> While Congress has from time to time revamped and redirected national labor policy, its concern for the integrity for the strike weapon has remained constant."

This Court has also made clear that there is no absolute right to engage in every kind of strike nor can a state be deprived of the power to deal with coercive conduct and unlawful practices. *Auto Workers* v. *Wisconsin Board, supra,* 336 U. S. at 264. The question in each case is whether restrictions placed upon concerted activities are reasonable.

It must be remembered that the employees in the case at bar are not government workers. Although their employer is not organized for profit, it is a private entity. Strikes in this area are not against the sovereign state nor in violation of any oath of office. Prohibition relating to such employees must therefore be framed with particular care to preserve First Amendment rights.

The decision below found that "a serious question of due process might arise" if the certification of appellant union by the New York State Labor Relations Board were not subject to immediate judicial review (Appellant's Appendix p. A16). Yet this Court has ruled precisely to the

contrary with respect to judicial review of unions certified under the provisions of the National Labor Relations Act, *supra* and the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* In *Railway Clerks* v. *Non-Contract Employees,* 380 U. S. 650 (1965), a suit challenging a ballot to be used in a representation election alleged that the National Mediation Board's failure to leave a space for voting "no union" was improper. The District Court found the form of the ballot to be invalid and enjoined the election. This Court reversed, holding that the matter was not subject to judicial review unless the Board exceeds its statutory authority:

> "The very nature of the arguments indicate that the Board's choice of its proposed ballot is not subject to judicial review, for it was to avoid the haggling and delays of litigation that such questions were left to the Board." (380 U. S. at 671.)

See in accord *Switchman's Union* v. *National Mediation Board,* 320 U. S. 297 (1943); *Fogg* v. *Randolph,* 244 F. Supp. 885 (S.D.N.Y. 1962); *Brotherhood of Locomotive Firemen and Enginemen* v. *Chicago Burlington and Quincy Railroad Company, et al.,* 225 F. Supp. 11 (D. C. 1964), aff'd per curiam 331 F. 2d 1020 (D. C. Cir. 1964), cert. den. 377 U. S. 918 (1964).

Unless the National Labor Relations Board exceeds its statutory powers, *Leedom* v. *Kyne,* 358 U. S. 184 (1958), its certifications cannot be directly challenged. *Boire* v. *Greyhound,* 376 U. S. 473 (1964). Federal courts examine certifications only where they are asked to enforce the findings of an unfair labor practice by an administrative agency; such review is an adjunct to determining whether disciplinary proceedings against the employer are warranted. See *American Federation of Labor* v. *N.L.R.B.,* 308 U. S. 401 (1940).

The dissent in the judgment below, after reviewing the similarities between the detailed provisions of the New York State Labor Relations Act and those of the Railway Labor Act concludes (Appellant's Appendix, p. A24):

> "It is our contention that the Legislature, in enacting Section 716 concluded that, in the interest of preserving the employees' Constitutional right to bargain collectively, the determination of a representative unit in non-profit making hospitals should lie solely with the State Labor Relations Board. The propriety of such a decision cannot be challenged in the light of the Supreme Court decisions, and in the light of the Legislature's own choice to avoid review by rejecting [a prior Legislature proposal which might have resulted in such review]."

The election being challenged by appellee hospital took place in July, 1964. After its certification by the State Labor Relations Board, and after rejection of its attempts to enter into negotiations as to contract terms, appellant union sought to invoke the provisions of § 716 of the Labor Law. The Industrial Commissioner first appointed a Fact-Finding Commission to inquire into the dispute and subsequently—upon the refusal of appellee hospital to accept the Commission's recommendations—ordered the commencement of arbitration. The majority in the court below found that the Industrial Commissioner had no authority to act in the dispute, indicating that it was an unfair labor practice for an employer to arbitrate with a minority union. The Court again referred to the "serious questions of due process" (Appellant's Appendix, p. A16) which would arise if there were no judicial review of the State Labor Relations Board certification prior to the commencement of arbitration, and said that the arbitration award would be rendered in a bilateral arbitration proceeding without giving necessary parties having a vital interest in the award an opportunity to be heard.

There are a number of misconceptions inherent in this reasoning. First, the employer cannot be penalized for dealing with a certified union. The very case cited by the decision (Appellant's Appendix, p. A17), *McGuire* v. *Humble Oil & Refining,* 355 F. 2d 352, cert. den. 384 U .S. 988, proves this point. The case concludes that it was an unfair labor practice for the employer to negotiate with a minority union when another union had already been certified as the proper representative. Thus, the court in *McGuire* relied upon the *certification* in determining with whom the employer should bargain.

Second, an employer has no valid interest in the results of an election in which it has no vote and with which it is prohibited from interfering. The U. S. Court of Appeals for the Second Circuit, in discussing the relation of an employer to the choice of its employees' representatives in *N.L.R.B.* v. *National Mineral Company,* 134 F. 2d 424, 426 (7th Cir. 1943), cert. denied 320 U. S. 753 (1943), stated:

> "It is the agent of the employees that is being chosen and not the agent of the employer. The employees have raised no question as to the proceedings in which their representative was selected. One would naturally expect the employer, unless prejudicially disposed towards unions, to be indifferent to the question of who is to be chosen to represent the employees. * * * The employer's interest and his great concern about whom the employees shall have as their representative for bargaining purposes are easily demonstrated as very unsubstantial. * * * In what forum in this land of ample legal machinery could the employees be heard to challenge the election of the stockholders' representative for collective bargaining?"

In *Foreman & Clark, Inc.* v. *N.L.R.B.,* 215 F. 2d 396 (9th Cir. 1954), cert. denied 348 U. S. 887, the Ninth Circuit

similarly questioned the employer's motives:

> "His self-interest may cause him to object to unionism in general; but once that objection is proved futile, of what possible concern can it be to him whether Group A of his employees is represented by Local 1 or Local 100? Or, if an employer objects to unionization of any kind, why should he hold out for even a larger unit than the one desired by his employees? Why should an employer, willing to accept a larger, comprehensive unit, haggle over the membership of a smaller one? What's Hecuba to him, or he to Hecuba?" 215 F. 2d 406-407.

However, the Court in the instant case ruled that employers "possess" (Appellant's Appendix, p. A14) a right of judicial review under § 707 of the State Labor Relations Act—that is, that the union is compelled to charge the employer hospital with an unfair labor practice so that in the course of the subsequent administrative hearing and judicial confirmation on this question, the issue of certification is reviewed. Since this cumbersome procedure must be completed before the arbitrators appointed under § 716 can hold hearings and begin to set out the general terms of a contract, it is unlikely that unions whose status is put into dispute would resort to the compulsory arbitration provisions. Thus there may be little further litigation in New York on this question, in spite of the broad practical impact of this holding.

The Court of Appeals explained its conclusion by stating (Appellant's Appendix, pp. A14-A15):

> "A decision that the validity of the Board's certification cannot be tested in the court until time consuming mediation, fact-finding and compulsory arbitration proceedings have been exhausted can only serve to delay the rendition of a prompt determination as to the representation issue, a delay which is not in the inter-

> est of the public, the voluntary hospitals or the unions, since unresolved representation issues may cause the very strife which the 1963 amendments were enacted to prevent."

Yet the effect of this ruling is to put the burden upon the union to go through "time consuming" administrative and court reviews of its certification, and to put the employees in the position of waiting indefinitely to ameliorate the terms and conditions of their employment. As pointed out by the dissent (Appellant's Appendix, pp. A25-A26).

> "Section 706, dealing with the prevention of unfair labor practices has permitted employees since 1937 to engage in strikes and other lawful, concerted activity while the unfair labor practice charge is investigated, and if it is sustained, while it is being reviewed by the Supreme Court. Thus, the employer has an avenue of review, and the employee is armed with effective weapons for penalizing dilatory tactics. This was in accord with the general policy of the entire act: 'It is in the public interest that equality of bargaining power be established and maintained.' (§ 700)
>
> • • •
>
> "As we interpret section 716, a prompt submission of disputes to collective bargaining and compulsory arbitration was a *quid pro quo* for the legislative prohibition of strikes in non-profit hospitals."

In order to serve as the *quid pro quo* for the ban on striking, arbitration must be a quick and efficacious remedy without interminable intermediate steps prior to its conclusion. Cf. *United Steel Workers* v. *Warrior & Gulf*, 363 U. S. 574, 581, 585 (1960).

A period of 2½ years was estimated by the court below to be the duration of an unfair labor practice proceeding and judicial review of the administrative determination

(Appellant's Appendix, p. A18, footnote 6). We must add to this a period of perhaps equal length for the holding of hearings before the arbitrator, the arbitrator's decision, and a limited judicial review of this decision. The case at bar, therefore, impairs the right of non-profit hospital workers to act in concert to better their working conditions, since they may not strike, are not recognized by their employer, and must wait for four years or more before their representative is actually permitted by law to consummate a collective bargaining agreement on their behalf.

CONCLUSION

For the foregoing reasons it is respectfully requested that this Court note probable jurisdiction and grant plenary consideration to the instant appeal.

Dated: New York, New York, February 14, 1969.

Respectfully submitted,

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